cars, $24,000 pa for personal expenses, hire purchase for a car and rather high maintenance for his two sons. On the other hand, the respondent had, in my view, understated her expenses. She is obviously a very frugal person and not given to making exaggerated claims. I accept her evidence that she has not been adequately maintained during all the years she was paid only $800 pm and that she had to seek financial assistance from her daughter and her brothers. The petitioner must discharge his obligations. I have given this matter very anxious thought and considering 'all the circumstances of the case' I order the petitioner to pay the respondent $1,800 pm maintenance with effect from 1 June 1988. As from 1 June 1988 the petitioner, however, would not be liable for the outgoings of No 14 Clover Way and my earlier order that he pay for the outgoings is varied accordingly.

I now deal with the respondent's application for a lump sum under s 109(1) of the Women's Charter, which reads: 'A maintenance order may provide for the payment of a lump sum or such periodical payment as the court may determine'. I agree with counsel for the petitioner that *Wachtel* v *Wachtel*[1] is not applicable, as the question of a lump sum in that case was considered in relation to the matrimonial home. In the present case, as I had noted, the respondent has a half share in No 14 Clover Way which was valued at $370,000; the other half share being vested in her daughter. I accept that *Fraser* v *Fraser*[2] is relevant. The petitioner's wealth was largely inherited and his own acquisitions were achieved in the course of his professional practice, with considerable help from the party-cited, during a period when his marriage to the respondent was over to all intents and purposes. Further, his inheritance in the form of the shares in the private companies are all not easily realizable. Accordingly, I am not prepared to exercise my discretion under s 109(1) but I am anxious to secure the payment of maintenance to the respondent who, being a traditional Chinese lady, is in my opinion unlikely to remarry. I therefore order under the powers conferred on me by s 109(2) that the petitioner shall hold the income of all his shares in the private companies mentioned in this judgment as a trustee upon trust to pay the maintenance or any part thereof and, subject thereto, he may beneficially deal with the residue, if any, of his income from the said shares. On the question of costs, I have in mind the entire proceedings herein for ancillary reliefs. I order the petitioner to pay costs to the respondent.

Order accordingly.

Solicitors: *Chung & Co*; *Ng & Ng*; *Richard Laycock*.

Reported by *Terence Tan Bian Chye*

MALAYSIAN REPORTS

Re Heng Peng Hoo & Anor

HIGH COURT (PENANG) – DIVORCE PETITION NO 47-38-1983
MOHAMED DZAIDDIN J
29 MAY 1989

Family Law – Divorce – Joint petition – Application for share of matrimonial home – Property acquired by sole effort of husband – Contributions made by wife – Law Reform (Marriage and Divorce) Act 1976, s 76(1) & (4)

In this case the marriage between the parties had been dissolved on a joint petition for divorce. The applicant applied for an order for the division of the property and claimed a half-share of the matrimonial home registered in the name of the respondent-husband.

Held, dismissing the application but making an order for a lump sum payment:

(1) After considering the entire evidence the court was satisfied that the property was not jointly acquired but was acquired by the sole effort of the respondent. The application under s 76(1) of the Law Reform (Marriage and Divorce) Act 1976 therefore failed.

(2) The applicant had made contributions by rendering domestic services to the husband and towards the welfare of the family and by looking after the four children and bringing them up.

(3) In the circumstances of this case, it is appropriate, instead of ordering a division of the property, to make an order for a lump sum payment to be made by the respondent to the applicant. Bearing in mind the extent of the contributions by the applicant to the welfare of the family, by caring for the children and looking after the family, a sum of $10,000 would be a fair assessment of her contributions.

Cases referred to

1 *Gissing* v *Gissing* [1970] 2 All ER 780 (not follld)
2 *Wachtel* v *Wachtel* [1973] 1 All ER 829 (not follld)
3 *Kowalczuk* v *Kowalczuk* [1973] 2 All ER 1042 (not follld)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 s 76

Neoh Lay Choo for the applicant.
Tan Boon Hee for the respondent.

Cur Adv Vult

Mohamed Dzaiddin J: This is an application by Madam Goh Ah Moy ('the applicant') on a joint petition for divorce (the marriage having been dissolved by this court on 11 August 1983) for ancillary relief under r 56 of the Divorce and Matrimonial Proceedings Rules 1980. She is asking this court to make an order for division of a piece of property known as lot 2862 Mukim 15, Jalan Kulim, Seberang Perai Tengah, bearing title HS(M) No 627 together with a dwelling house known as No 64 Lorong Sepakat Tiga, Taman Bandaraya, Bukit Mertajam ('the said property'), under s 76 of the Law Reform (Marriage

and Divorce) Act 1976. In short, she wants a half-share of the matrimonial home which is registered in the name of the petitioner-husband (the respondent).

The application is supported by an affidavit affirmed on 31 May 1984 (encl 9), whereby the applicant deposed that she had made substantial contributions financially and materially and in other diverse ways towards the well-being of the marriage and family and for acquiring the said property.

In an affidavit affirmed on 10 January 1985 (encl 20) the respondent disputed the applicant's claim that she had substantially contributed in acquiring the said property. According to him the said property was bought in 1978 for $38,000, where he paid a down payment of $14,000 from the commissions which he earned as an insurance agent between 1976 and 1977. The balance of $26,000 was borrowed from a bank which he had been repaying by monthly instalments of $291 per month. There was still an outstanding sum of $20,000 due to the bank. The respondent, however, conceded that the applicant brought up and looked after their four children of the marriage from the time they were born and since acquiring the said property they have lived with him in the matrimonial home. Further, the respondent stated that the applicant's earnings as a hairdresser during the early years of the marriage was minimal which was only sufficient to pay for her own pocket expenses and occasionally for sundry expenses for the children. It seemed that whatever savings she had from her casual employment as a hairdresser was used to pay for an advance fee for her one-month hairdressing course in Bangkok between October and November 1980. Admittedly the applicant has become a successful hairdresser and is the sole proprietor of a hairdressing and beauty saloon in Bukit Mertajam earning substantial income and having no dependant to support. The respondent claimed that he paid the capital sum of $10,000 for setting up her saloon, as evinced from some of the receipts exhibited in his affidavit. Finally, the respondent stated that he had remarried and has three children from his second marriage who are living with him at a rented house in Bukit Mertajam. He is now employed as a travelling salesman with a salary of $1,100 per month.

The applicant then affirmed a supplementary affidavit (encl 37) contending that she contributed towards the purchase of the said property by paying the initial sum and incidental costs, and later by paying for its maintenance and renovations. The payments were derived from the joint account kept with the Central Malaysia Finance Berhad ('CMFB') where she claimed that her earnings as a hairdresser were credited into the said account from time to time. This fact was hotly denied by the respondent who, in his subsequent affidavit, explained that although they had a joint account in CMFB, all the money credited therein, however, belonged to him. The respondent stated that the applicant had never credited any substantial sum into the joint account. The purpose of having a joint account was to enable the applicant to use it to pay for sundry expenses, although in 1975 he used the money from the account to purchase a family car, KC 4747, which they subsequently changed to another car in 1978.

Finally, when the application came up for hearing before me, Mr Tan Boon Hee, for the respondent, made an application to cross-examine the applicant on her affidavits. Questions were asked about her financial position and her thriving business as a hairdressing saloon proprietor. The applicant admitted earning a net income of $1,000 per month. She was also asked about another dwelling house at No 108 Jalan Sepakat, Bukit Mertajam, which counsel suggested belonged to her and that she paid a down payment of $48,000. The applicant denied the suggestions and stated that the house belonged to her brother who had it registered in her name because she was granted a bank loan. Her brother had been repaying the bank about $330 per month. It should also be mentioned here that Miss Neoh, for the applicant, had also cross-examined the respondent on his affidavits.

The law

Section 76 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') gives the court power, when granting a divorce or judicial separation, to order the division between parties of any assets acquired by them during the marriage. The section is divided into two parts, one is where the assets were acquired by joint efforts (sub-s (1)) and the other where they were acquired by sole effort by one party to the marriage (sub-s (3)). The application for a half undivided share of the said property to be transferred to her absolutely plainly comes under sub-s (1). In exercising the power under the sub-section, the court shall have regard to three factors and subject to them, the court is directed to incline towards equality of division (sub-s (2)). The three considerations are as follows:

(a) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;
(b) any debts owing by either party which were contracted for their joint benefit;
(c) the needs of the minor children, if any, of the marriage.

From the authorities submitted by both counsel, there appears to be no reported local decisions directly on the issue before me. However, according to the Explanatory Statement to the Bill, this s 76 follows generally the principles set out in s 37 of the English Matrimonial Proceedings and Property Act 1970. After studying s 37

of the English Act, I form the view that our s 76 cannot be said to be modelled entirely on the English provision. The General Note to the section (See *Halsbury's Statutes* (3rd Ed), Vol 40 p 833) states that the section was introduced to clarify in what circumstances, if at all, a contribution by one spouse to the improvement, as opposed to the original acquisition, of property owned by the other or in joint names, confers on the contributor a beneficial interest therein. Section 37 specifically provides that the contribution by one spouse must be substantial. Whereas under our s 76, one of the considerations for equality of division need only be the extent of the contributions made by each party in money, property or work towards the acquisition of the assets, it also does not require the joint efforts to be substantial. In the light of the above, in my view, any attempt to apply the English principles based on the provisions of their 1970 Act to the present case would be misleading and erroneous. Therefore, cases like *Gissing* v *Gissing*,[1] *Wachtel* v *Wachtel*[2] and *Kowalczuk* v *Kowalzuk*[3] cited by counsel are inapplicable.

I was also referred by Miss Neoh to an article: 'Division of Matrimonial Property upon Termination of Marriage [1989] 1 MLJ xiii, by Leong Wai Kum of the National University of Singapore which discussed s 106 of Singapore's Women's Charter (Cap 353, 1985 Ed). From the article, it appears that the Singapore section is similar to our s 76. On this assumption, the reported decisions of the Singapore courts could be relevant for my consideration, despite, according to the learned writer, there having only been four reported decisions in Singapore. However, after reading them, I agree with her comment that it would be treacherous to try to discern general trends from a mere handful of cases. Having stated the above, I am left with the task of deciding the present application solely by considering the section and applying its provisions to the facts as I find them therein.

Conclusions

After considering the opposing affidavits of the parties, their oral testimonies and the submissions of counsel, I come to the following conclusions. Firstly, I am satisfied that the applicant has failed to show that she had contributed by her joint efforts towards acquiring the said property. She merely contended that she made substantial contribution financially and materially and in other diverse ways towards the well-being of the marriage and the family, without any evidence in her affidavit to substantiate this contention. Whatever was deposed by her on this point had been rebutted by the respondent which I accept to be the truth of the matter. It is not disputed that both of them operated a joint account with CMFB, which according to the respondent was used for the purpose of paying sundry debts and expenses. Looking at the statement of account of the joint account exhibited, it is clear to me that between 1976 and 1983, only a small sum of money was maintained in the said account. The statement also showed that on 12 January 1978 the account had exceeded $5,000, where a sum of $4,550 was withdrawn on 28 January 1978 to purchase a family car. From the statement, there is no truth in the applicant's contention that the initial payment for the purchase of the property and incidental costs was taken from the savings credited by her in the said joint account. Further, it is not disputed that the purchase price of the said property was $38,000 and that the respondent had obtained a bank loan of $26,000 leaving an initial sum of $14,000 which he stated was paid from his own savings and commissions. However, what the applicant chose to dispute was this payment of initial sum of $14,000 which she contended was paid from the joint savings account. If this were true, then one would see from the statement in the joint account, record of withdrawals of money from time to time in 1978 when the said property was purchased.

Secondly, I am also satisfied that the applicant has failed to show that she had actually contributed to the subsequent costs of maintenance and renovation of the matrimonial home, as contended by her. She seemed to rely on the joint account in CMFB by claiming that she credited her income from her hairdressing job into the said account from time to time and that the respondent used the money from the joint account to pay for the maintenance of the matrimonial home. However, she failed to show from the statement the dates and the amount credited by her. Upon a second look at the statement of account, I find there were several payments being credited into the account. Likewise, withdrawals were also made at diverse times. At any rate, they were not a substantial amount which suggests any payment for the costs of maintenance and renovation. On the whole, I believe the respondent when he stated that the account was kept for the purpose of paying sundry debts and expenses.

Thirdly, from the evidence, the respondent had throughout the marriage given substantial assistance and encouragement to the applicant in pursuing her career as a hairdresser which enabled her to be what she is today – the successful proprietor of a hairdressing saloon. I am satisfied that in the early stage of her career her income was minimal, perhaps just sufficient to pay for her own pocket expenses and occasional sundry expenses for the children. Undoubtedly, it must have been very hard for her to be working as a hairdresser as well as to take care of the children. However, from the meagre income, I feel it is unlikely that she could at the early stage of the marriage or even in 1978 (two years before she went to Bangkok to do her hairdressing course) to have contributed towards paying for the initial or incidental costs of the said property.

Fourthly, it is never disputed that the respondent has been repaying the bank loan for the said property which the applicant had not contributed financially. As for the children, it is a fact that they are under the care of the respondent.

Therefore after considering the entire evidence in this application, I am satisfied that the said property was not jointly acquired by the applicant, but by the sole effort of the respondent. Hence, the application under s 76(1) of the Act fails.

This leaves me to consider sub-ss (3) and (4) of the Act, ie the division of the assets acquired by the sole effort of one party. Miss Neoh has submitted on this provision as an alternative prayer to the main application. Taking the evidence as a whole, I am inclined to grant the application under sub-s (3). It is common ground that the applicant, first, as a wife must have rendered her domestic services to the husband and towards the welfare of the family. Secondly, as a mother, she had to look after the four children and to bring them up. Obviously, these are contributions which cannot be quantified in money. Although the four children are now grown up and under the custody of the respondent, the fact remains that they were brought up and cared for by the applicant. In making any order for the division of any assets under this sub-section, I must be guided by the considerations provided for under sub-s (4), ie the extent of the contributions made by the applicant as a wife and mother to the welfare of the family and children of the marriage, although the overriding consideration must, however, be that the respondent should receive a greater proportion of the assets.

In exercising my discretion under sub-s (3) I am not ordering the division of the assets proportionate to each party's contribution or the sale of the said property and divide up the proceeds accordingly, for to do so will be inequitable and cause grave hardships to the respondent. After all, the property in question is the only asset acquired by him during marriage. It is the only property which the respondent can afford to own, considering his present financial standing. He continues to pay the housing loan instalments monthly. Custody of the children was given to him and they continue to live with him in the said home. On the other hand, the applicant is financially well off, having her own hairdressing saloon and earning, on her own admission, a monthly income of $1,000. In addition, she owns another house at No 108 Jalan Sepakat (although denied by her) where she can live comfortably. Therefore, in the circumstances of this case, it is my conclusion that it is more appropriate to make an order for a lump sum payment to be paid by the respondent to the applicant. Thus, bearing in mind the extent of the contributions by the applicant to the welfare of the family by caring the children and looking after the family, a sum of $10,000 will be a fair assessment of her contributions.

Accordingly, I make an order for the respondent to pay the applicant a sum of $10,000 and agreed costs of this application of $2,000.

Order accordingly.

Solicitors: *Tan Yu & Co*; *Tan Teh & Co.*

Reported by *Prof Ahmad Ibrahim*

Joseph Jeganathan v Rosaline Joseph

HIGH COURT (ALOR SETAR) – DIVORCE PETITION NO 47-11-86
KC VOHRAH J
22 MAY 1989

Family Law – Divorce – Marriage irretrievably broken down – Whether respondent had behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent – Test to be adopted – Circumstances of the case – Law Reform (Marriage and Divorce) Act 1976, ss 47, 53(1), (2), 54(1)(a), (b), (c) & 54(2) – UK Matrimonial Causes Act 1973, ss 1(1), (2)(a), (b), (c) & (3) – UK Domestic Proceedings and Magistrates' Courts Act 1978, s 1(c)

The petitioner and the respondent were married in 1959 and have two children, a daughter aged 28 years and a son aged 25 years. The petitioner filed a petition seeking a dissolution of the marriage, alleging that the marriage had broken down irretrievably in that the respondent had behaved in such a way that he cannot reasonably be expected to live with her. The respondent denied that the marriage had broken down irretrievably, alleging that there was still life in the marriage and efforts at reconciliation have not been exhausted.

The evidence adduced showed that the matrimonial home was filled with bitterness, strife, suspicion and tension generated by frequent violent quarrels between the petitioner and respondent and long periods of silence between the respondent and the rest of the family. There was virtually daily absences of several hours by the respondent from the matrimonial home and at times for periods up to 70 to 80 days. Efforts at reconciliation had been unsuccessful. The petitioner relied on the cumulative effect of all these problems to show that the marriage had irretrievably broken down.

Held, granting a decree nisi:

(1) The court under s 53(2) of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') shall inquire into the facts alleged as causing or leading to the breakdown of the marriage and, if satisfied that the circumstances make it just and reasonable to do so, make a decree of its dissolution. The court shall also have regard to one or more of the four facts stated in s 54(1).

(2) The proper test to be adopted is whether a right-thinking man in all the circumstances would conclude that the respondent had behaved in such a way that the petitioning spouse could not reasonably be expected to live with the res-